United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6137

To be argued by
MARVIN SCHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6137

W. J. USERY, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,
Appellee,

—against—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,
Appellant.

DEFENDANT-APPELLANT'S BRIEF

MARVIN SCHWARTZ
Attorney for Appellant
243 Waverly Place
New York, N. Y. 10014
(212) 691-2251

MARVIN SCHWARTZ
BURTON M. EPSTEIN
Of Counsel

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Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

Preliminary Statement

This is the defendant-appellant's consolidated appeal from an interlocutory order entered by the Court below (hereinafter Judge Motley) on July 6, 1976. Two appeals were filed from that same order. The first appeal was filed in accordance with 28 U.S.C. §1292 (a) which permits appeals from interlocutory orders as a matter of right. The second appeal, was filed solely as a precautionary measure, and was filed in accordance with the procedures required by Rule 5 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292 (b).* Both appeals involve the same issue.

* November 1, 1976—we were advised today that permission for this second appeal was granted.

Judge Motley's interlocutory order enjoined the defendant-appellant in its next election of officers, from using a portion of its Constitution and By-Laws and directed the defendant-appellant to create and employ certain new constitutional and by-law provisions. The context in which the dispute arises is set forth in the *Statement of the Case* and the *Statement of Facts*, below.

Statement of the Case

In 1972, the Secretary of Labor brought suit in the United States District Court to set aside the defendant Union's 1971 election. Jurisdiction of the action is based on Title IV of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA").

About four years later, on April 15, 1976, summary judgment against the Union was entered by Judge Motley.[1] The Judge ordered the Union to hold an immediate special remedial election under the Secretary's supervision.

On appeal to the United States Court of Appeals for the Second Circuit, that Court upheld the lower Court finding that the distribution of the literature was in violation of "LMRDA", but found that the plaintiff's insistence upon holding a special election before the end of 1976, was arbitrary and unreasonable.[2] Instead, the

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[1] The District Court's decision was based solely upon the distribution by the Union of a single piece of literature. Slightly more than a month before the 1971 election, the defendant was also conducting a separate union-wide referendum on a proposed affiliation with another labor organization. About a month before the election, the Union distributed to its membership a written newsletter. The District Court held that this newsletter constituted prohibited campaign propaganda and its distribution invalidated the 1971 election of all three of the International Officers and all of the forty-one Offshore Division Officers.

[2] The Secretary argued that his decision when to hold the election was unreviewable. The Court of Appeals specifically rejected this argument. (J.A. 309-310, footnote 11).

Court directed that the Secretary supervise the Union's next regular triennial election.[3]

The Court of Appeals expedited the defendant's appeal from the District Judge's Order, and the appellate argument was held on June 18, 1976. The decision of the Court of Appeals was handed down on July 12, 1976. However, the Secretary exercised his right under the "LMRDA" to proceed pending the appeal, and his election machinery was well under way prior to the July 12, 1976 decision.

Starting at the end of May, 1976, the Secretary scheduled various election conferences for the purpose of discussing ground rules for the special remedial election granted by Judge Motley. During these conferences several issues arose. On July 1, 1976, both sides appeared before Judge Motley and a transcript of the oral argument was made. At this hearing, all of the issues were resolved, except for one which is the basis for this appeal. It relates to the provisions of the defendant's Constitution and Offshore Division By-Laws which provide that the three International[4] Officers, the International President (hereinafter President), the International Vice President (hereinafter Vice President) and the International Secretary-Treasurer (hereinafter Secretary-Treasurer) all duly elected by the membership at large in a secret ninety day mail referendum ballot, would serve as the *unpaid* Executive Officer, Assistant Executive Officer and Fiscal Officer, respectively, of the Union's fully formed Divisions. The Offshore Division

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[3] Nominations for this election start in June 1977 and the 90 day balloting period begins in the fall of 1977.

[4] The defendant is in fact a national union. A number of years ago it did have some Canadian locals.

is a fully formed Division and accordingly these three officials have been serving in that capacity since 1971.[5]

The plaintiff argued that these provisions violated the Labor-Management Reporting and Disclosure Act and Judge Motley upheld the Secretary's position. After oral argument on July 1, 1976, an Interlocutory Order was entered on July 6, 1976 which among other things declared these provisions invalid;[6] and this appeal is from that Interlocutory Order.

The Order enjoined the Union from enforcing or implementing these provisions in any way. It also directed

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[5] The President, Vice President and Secretary-Treasurer perform the same duties for the Pilots Division. Under the Constitution the three International Officials have the same responsibilities in other fully formed divisions. This is unchallenged by the Secretary because he has not received a complaint from a member.

[6] In relevant part, that order reads as follows:

"1) that an arrangement embodied in the union's International Constitution and the union's Offshore Division's By-Laws is in violation of the Act in that it permits the union's International President, Vice-President and Secretary-Treasurer, elected by the membership at large, to become, automatically by virtue of their election to International office, the three principal officers (Executive Officer, Assistant Executive Officer and Financial Officer) of the Offshore Division, a separate labor organization, without there being a separate election among the members of the Offshore Division alone for their own three principal officers (hereafter the "invalid arrangement"); . . .

. . . it is hereby

ORDERED that:

1) the arrangement described above permitting the three International officers to become the three principal officers of the Offshore Division is declared invalid and the union shall not adhere to any provision in its International Constitution and its Offshore Division's By-Laws which permits this invalid arrangement to continue in effect nor shall it substitute any other provisions which in any way permits the invalid arrangements to continue; . . .

the Union to create three new officer positions in the Offshore Division; to determine what pay, if any, would be paid to these officials; to decide what duties these new officials would perform; and to decide also whether or not a member could hold one of these new positions in addition to another elected office in the Union. Since the Union's Constitution and Offshore Division By-Laws permitted changes only by secret ninety day mail referendum ballot, Judge Motley's Order directed the Union's governing boards to make the aforesaid changes without such membership referendum.

Question of Law Presented

There is only one question presented on this appeal. The question presented is purely a question of law. The facts are undisputed. It may be phrased as follows:

> Whether it is legal for the defendant's Constitution and By-Laws to provide that its President, Vice-President and Secretary-Treasurer elected by the defendant Union's membership at large in a secret ninety day mail referendum ballot shall serve, without pay, as the Executive Officer, Assistant Executive Officer and Fiscal Officer of the Offshore Division. Or, must the vote for those Offshore Division officers be restricted solely to Offshore Division members as the Secretary of Labor contends?

Statement of Facts

The International Organization of Masters, Mates and Pilots (hereinafter ICMM&P) is a Union composed primarily of licensed deck officers serving aboard American Flag oceangoing passenger, cargo and tanker vessels; ship's officers serving on tugboats and other inland

craft on the rivers, bays and sounds of the United States; and the pilots who navigate American and Foreign Flag vessels in and out of the various ports of the United States.

Prior to 1970, the defendant Union was structured in accordance with the general traditional pattern of Locals governed by a National Executive Board and a National Convention. There were Offshore Locals, Pilot Locals, Great Lakes Locals, and a variety of Inland Locals. All of the Locals sent delegates to the National Convention and the Union Constitution provided for representation of Offshore, Pilot, Great Lakes and Inland Locals on its National Executive Board. While the Locals had a substantial degree of autonomy, each Local's By-Laws were limited by the requirement that they not conflict with the National Constitution and the National Executive Board supervised the affairs of all of the Locals between Conventions. The National officers exercised substantial authority over the various Locals with regard to the collective bargaining agreements and their finances.[7] This structure had prevailed since 1887 and when the Union discarded it in 1970, it was the last of the maritime unions to do so.

After 1970 a new National Constitution and a set of Offshore Division By-Laws were adopted. The new Con-

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[7] The President, for example, was the Chairman of the Atlantic and Gulf Negotiating Committee. The Secretary-Treasurer was the Secretary of the Atlantic and Gulf Negotiating Committee. The National was also responsible for enforcing the Atlantic and Gulf Coast Offshore collective bargaining agreement.

The Secretary-Treasurer supervised the finances of the Locals; prepared the reports required by the Labor-Management Reporting and Disclosure Act; allocated costs of the negotiations of the collective bargaining agreements and supervised the transmission of monies and dues between the various locals.

stitution was first approved by a two-thirds majority of the delegates at the Union's National Convention. Thereafter, it was adopted by a secret ninety day mail referendum ballot of the entire membership. At the same time, the Offshore Locals voted, subject to ratification by their members, to form an Offshore Division and a set of proposed Offshore Division By-Laws was drafted. All of this was submitted to the membership of the Offshore Division Locals and voted on and approved in a secret ninety day mail referendum ballot.[8]

Thus, before this provision (hereinafter the "double duty provision")[9] became effective, the membership at large voted to amend the National Constitution to include that provision; and *separately* and *apart* and *in addition* the members of the Offshore Locals voted to adopt a set of Offshore Division By-Laws which would include that "double duty provision". Also, in both instances, i.e., the amendment of the National Constitution and the adoption of the Offshore Division By-Laws, the voting was by a secret ninety day mail referendum ballot. Further, such referenda were submitted to the membership in accordance with the then existing Constitutional provisions which required a two-third majority affirmative vote by the delegates at the National Convention before submission to the membership for their approval.

The consolidation of the Offshore Locals in one Offshore Division was designed to end the Local factional-

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[8] Included in the new Constitution and also set forth in the Offshore Division By-Laws, was the amendment which provides that its President, Vice President and Secretary-Treasurer elected by the defendant Union's membership at large in a secret ninety day mail referendum ballot shall serve, without pay, as the Executive Office, Assistant Executive Officer and Fiscal Officer of the Offshore Division.

[9] The Secretary refers to it as "scheme" (J.A. 78 and 273).

ism [10] and the competition [11] between Locals for membership. It was also designed to permit uniform consistent administration of the affairs of the Union by centralizing overall responsibility in the three National officials who were to be duly elected by the entire membership in a secret ninety day mail referendum ballot. It was towards this end, and also for reasons of fiscal economy, that the Union's Constitution and the Offshore Division By-Laws were amended to include the "double duty provision" whereby the three National Officers served as the Executive Officer, Assistant Executive Officer and Fiscal Officer, respectively, of the Offshore Division.

The Offshore Division By-Laws provide that its governing body shall be the Offshore Division Executive

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[10] Members were dissatisfied with the representation they had received when they were aboard ship in ports outside of their home Local. Since they did not vote for any Local officials other than those in their own home Local, the "responsiveness" of the Patrolman from the other Locals was often questionable. Thus, a member of a New York Local when aboard ship in the Port of New Orleans, would submit his grievances to a Local official for whom he did not vote.

Under the new consolidated arrangement, the Offshore Division By-Laws provide that all members of the Offshore Division vote for all of the Offshore officials. Now, it does not matter in which port an Offshore Division member arrives to present his dispute. The Patrolman who calls aboard his vessel is an official for whom he votes, since he votes for all Patrolmen.

[11] Under the old Constitution, Locals had different membership dues. The National Constitution merely set a minimum. The large Locals were financially able to charge the minimum or close to it. The small Locals were compelled to charge more. All Locals competed for new members in order to collect their dues and pay their Local officials and expenses. Each Local kept all of the dues of those members except for a small per capita forwarded to the International.

Council (hereinafter the O.D.E.C.).[12] All decisions which are vital to the Offshore Division are made by the O.D.E.C. There are seventeen members of the O.D.E.C., three of which are the National Officers. The other fourteen members are the duly elected Offshore Division Port Agents who are voted for solely by Offshore Division members. Each O.D.E.C. member has one vote and thus the three National Officials have three votes of the seventeen.

The Offshore Division By-Laws also provide for the Offshore Division Negotiating Committee.[13] This Committee negotiates the Offshore Division collective bargaining agreement which is the labor contract under which the members of the Offshore Division work. The Negotiating Committee consists of thirty-one persons in addition to the three National Officials. Each member of the Negotiating Committee has one vote and accordingly the three National Officials have three votes of the thirty-four.

Thus, the three National Officials may do "double duty" but they can hardly be accused of being a "power bloc" in the Offshore Division. Nevertheless, the Secre-

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[12] Article IX, Section 2(b), provides:

"*Section* 2(b). The Offshore Division Executive Council shall have the authority to consider and act on any and all matters affecting the Offshore Division."

[13] Article X, *Section 3. Negotiating Committee*

"A Negotiating Committee consisting of the International President, International Executive Vice President, International Secretary-Treasurer, the Vice Presidents, twelve members from the Atlantic Coast, eight members from the Gulf Coast and eight members from the Pacific Coast, shall prepare contract demands and approve tentative settlements of any contracts affecting the Offshore Division. The Negotiating Committee by its majority vote shall have the authority to call a strike against an Employer or Employers. A Majority vote of this Committee shall be required before a proposed contract is presented to the membership in referendum ballot, for ratification.

tary challenges this structure as violative of 29 U.S.C. § 481 (a), (b) and (d) of the Act because the three National Officials are elected by the entire membership of the Union. His theory is that since the members of the Pilots Division, and members of the Inland Division, etc., have a say in the selection of the *three National Officials, who also do "double duty" as unpaid officers of the Offshore Division*, this "scheme" contravenes the statute.

The Decision Below

There is no written opinion below. Judge Motley's ruling, declaring the "double duty provision" invalid was made at the July 1, 1976 hearing. At J.A. 116-117 the Court below states as follows:

> "I think we have exhausted the issue now.[14] I have taken the time during the recess to review this Court's decision in the National Maritime Union case and as I indicated earlier, it seems to me that this is an arrangement similar to the arrangement in that case with respect to the election of port officers and port agents, as I believe they were called in that case, port agents. Just as the arrangement in the National Maritime Union case violated the provisions of Section 481 (a), it seems to me the situation here is similar, in that

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[14] In addition to hearing oral argument and examining the moving papers, (J.A. 3-63), the Court examined the parties briefs to the Court of Appeals in Case 76-6076 (See J.A. 113). Counsel for plaintiff and counsel for defendant had both raised the issue of the double duty provision in their briefs to the Court of Appeals (J.A. 221-224 and 269-276). Both sides had urged its resolution in the interest of judicial economy and in order to advance the termination of this litigation. However, inasmuch as Judge Motley had not yet ruled on this issue, the Court of Appeals chose not to decide it.

> the officers [15] of the Offshore Division are not elected as required by that statute. So that the Court now rules that the provision is invalid."

In fairness, Judge Motley's total reasoning is not reflected in the above portion of the transcript which seems to rely solely on the N.M.U. case [16] as the basis of a § 481 (a) violation. The preceding pages of the transcript show that the Court below also agreed with plaintiff's counsel's contention that the "double duty provision" was "inconsistent with the broad purposes of the Act to promote democracy in the Unions." [17]

ARGUMENT

POINT I

The Court below erred in holding that the issue in the National Maritime Union case and the issue in the instant case are similar

In her holding below, Judge Motley held that the "double duty provision" in the instant case is an arrangement similar to the arrangement in the National

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[15] Judge Motley was referring only to the three National officials serving as the *unpaid* Offshore Division Executive, Assistant Executive and Fiscal Officers respectively. The other 36 *paid* officials of the Offshore Division are elected solely by Offshore Division members and are not an issue in this case.

[16] *Wirtz* v. *National Martime Union of America*, 399 F.2d 551-3 (2d Cir. 1968), Affg. 284 F. Supp. 47 (S.D.N.Y. 1968).

[17] During the July 1, 1976 hearing, there is the following colloquy with reference to the "double duty provision":

> The Court: I understand that, but the issue is whether that is——
>
> Mr. Epstein: Violative of the statute
>
> The Court: —consistent with the broad purposes of the Act to promote democracy in the Unions. That is consistent, you think, with the broad purpose of the Act? (J.A. 97).

Maritime Union (hereinafter N.M.U.) case which violated Section 481 (a). As quoted at p. 13 supra, Judge Motley's analysis was:

> "Just as the arrangement in the National Maritime Union case violated the provisions of Section 481 (a), it seems to me that the situation here is similar, *in that* the officers [18] of the Offshore Division are not elected as required by that statute. *So that* the Court now rules that the provision is invalid." (Emphasis ours)

In the *N.M.U.* case, the issue was whether or not certain port agents and patrolmen could be appointed by certain other N.M.U. officials. The Secretary contended that the Union had violated "LMRDA" by failing to elect these port agents and patrolmen. The N.M.U. argued that these port agents and patrolmen did not fit within the statutory definition of "officers" and therefore did not have to be elected by the membership. The Court smiply held that, the N.M.U. Constitution notwithstanding, the duties of port agents and patrolmen placed them squarely within the statutory definition of "officer" (29 U.S.C. 402 (n)) and therefore they must be elected by the membership, at least once every five years.

There is no such issue in the instant case. Every three years, the three National officials (who do "double duty" as the unpaid Executive, Assistant Executive and Fiscal Officer respectively of any "fully formed" [19] Division)

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[18] See p. 13 footnote 15 *supra*.

[19] The phrase "fully formed" means that the members of the Local in that category have all voted affirmatively to become a Division. If not, the "double duty provision" does not apply. For example, it does not apply to the Inland Locals which voted instead to consolidate into two regions—1) Atlantic & Gulf; and 2) Pacific.

are elected by the entire membership in a ninety day secret mail ballot referendum. Also every three years and at the same time, the thirty-six Port Agents [20] and Assistant Port Agents (patrolmen) are elected by the membership of the Offshore Division, in their ninety day secret mail ballot referendum. The Secretary's complaint in the instant case is that too many members of the Union vote for the Executive, Assistant Executive and Fiscal Officers of the Offshore Division. In the N.M.U. case, the Secretary's complaint was that there was *no* vote.

POINT II

The Court below erred in holding that the "double duty provision" is inconsistent with the broad purposes of the act which are to promote democracy in unions.

In the Court below, the Secretary argued successfully that the "double duty provision" was "contrary to the democratic principles as known in the United States upon which Union elections must be based," and as authority for his argument he cited *Wirtz* v. *Hotel, Motel and Club Employees, Local 6*, 391 U.S. at 496, 504. In arguing that the "double duty provision" is invalid, the Secretary's argument continues: "It is tantamount to arguing that it would be proper for the President of the United States to assume the role of the Governor of New York simply because the people of New York participated in the President's selection." [21]

Wirtz v. Hotel, Motel and Club Employees, Local 6

The issue in the *Hotel, Motel and Club Employees* case is entirely different from the issue in this case. That

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[20] The New York, Galveston and San Francisco Port Agents are the three Vice Presidents of the Offshore Division.

[21] (See J.A. 78-79 and J.A. 272).

case is the leading case dealing with permissible eligibility requirements for union office. That case held illegal a union office eligibility requirement which disqualified 93% of the membership from holding elective office. It established a new statistical criteria for testing the validity of Union office eligibility requirements. It made immediately suspect any eligibility requirement which disqualifies a large percentage of the membership.

The plaintiff cites the *Hotel, Motel and Club Employees* case for the general proposition that union elections must be "free and democratic" and that the intent of the "LMRDA" is to insure responsive union government. No one argues with such a proposition and the *Hotel, Motel and Club Employees* case hardly need be used to support it. The "LMRDA" legislative history is full of statements that such was the intent of Congress and so are the opinions of at least half a dozen other Supreme Court cases.

However, the Supreme Court, in its many statements that union elections must be based on "democratic principles" and that the intent of "LMRDA" was to insure responsive union governments, *never fails to also state that it was not the intent of "LMRDA" to take away from unions the governing of their own affairs and to substitute either the Court or the Secretary of Labor.* Even in the context of the *Hotel, Motel and Club Employees* case, the Supreme Court did not fail to recognize that the two general propositions must be balanced, and at p. 496 stated as follows:

> "I. Title IV is one of the seven titles of the Labor-Management Reporting and Disclosure Act (LMRDA). Earlier this Term, we observed that 'Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and demo-

cratic' elections. The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.' Wirtz v. Local 153, Glass Bottle Blowers Assn., 389 U.S. 463, 470-471, 67 LRRM 2129."

The Legislative History

The legislative history of 481 (a) (b) and (d)[22] is particularly instructive. It is beyond dispute that in 29 U.S.C. 481 (a) (b) and (d)—and also (e)[23]—Congress sought to further its overall purposes of promoting democracy in Unions by guaranteeing "free and democratic" elections. In so doing, it specifically refused to dictate to unions the *substance* of their Constitution and By-Laws or the structure of their organizations. The whole thrust

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[22] § 481. "Terms of office and election procedures

Officers of national or international labor organizations; manner of election

(a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

Officers of local labor organizations; manner of election

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

Officers of intermediate bodies; manner of election

(d) Officers of Intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot."

[23] These sections are part of Title IV, "Elections".

of all of the Sections in Title IV of "LMRDA" is to guarantee the membership fair, frequent [24] secret ballot elections. Specifically Title IV guarantees members the right to nominate, vote, hold office—all free from reprisal—and a fair and honest ballot count. In seeking to promote its overall purposes of union democracy, however, Congress emphatically refused to legislate the contents of Union Constitutions and By-Laws, even *in the limited area of election procedures.*

At p. 1244 of Vol. II of the Legislative History of the "LMRDA", Senator Morse said:

> "I say most respectfully that what the amendment of the Senator from Nebraska [25] would do would be to have Congress of the U.S. dictate to the unions *what their constitution and by-laws procedures shall be in conducting their elections.*
>
> The purpose of the bill is to provide to the membership of the union *a guarantee of democratic procedures, and not to have Congress legislate* for the union . . . . I do not propose to vote for an amendment which undertakes to turn the Congress of the U. S. into a constitutional convention and by-laws legislative body for all unions of America." (Emphasis ours)

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[24] § 481(a) provides for National eelctions every five years. § 481(b) provides for Local elections every three years.

See also Senator Morses' explanation of § 481:

> "There are denied to the membership of some unions elections at reasonable periods of time so that democratic processes can work. We go so far as to say that they shall have their [national] elections not less frequently than every five years." "We provide that local union officials must be elected by secret ballot not less than every three years. We provided that democratic safeguard." [Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. II, p. 1244].

[25] The amendment proposed by the Senator from Nebraska was not adopted.

And then further at p. 1245:

> "Furthermore, Mr. President, the bill *guarantees procedures which will make it possible for union members to control democratically their own election* system. But the bill does not propose to write the union constitution and by-laws provisions for the union in every detail concerning the conduct of the elections." (Emphasis ours)

The Supreme Court has followed the expressed intent of Congress:

> "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections. The legislative history shows that Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs. *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463, 470-471, 67 LPRM 2129." *Wirtz* v. *Hotel, Motel and Club Employees*, 391 U.S. 492, 496 (1968).

The President of the United States Assuming the Role of The Governor of New York Simply Because the People of New York Participated in the Presidential Election

This is a case of first impression. The Secretary is "exploring the periphery" of the "LMRDA". It must be clear that the cases don't really help him in his exploration. Neither does the statute or its legislative history. Hence the Secretary's odd argument that for the Union to urge the validity of the "double duty provision" is:

> "(It is) tantamount to arguing that it would be proper for the President of the United States

> to assume the role of Governor of New York simply because the people of New York participated in the President's election". (Supra, p. 13)

As the Secretary must know, the "President-Governor" analogy really isn't any analogy at all because neither the United States Constitution nor the New York State Constitution contain such a provision. Before the "President-Governor" argument could begin to become even factually analogous, the United States Constitution would have to be amended [26] to include the "President-Governor" provision and, separately and apart from that amending process, the New York State Constitution would also have to be amended [27] to include the "President-Governor" provision.

The Secretary uses the "President-Governor" analogy in support of his proposition that there are ". . . democratic principles as known in the United States upon

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[26] U.S. Constitution, Art. V.—Amendments.

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourth of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; . . ."

[27] N.Y. State Constitution, Art XIX, § 1.

This Section provides in substance for proposal of amendments by the Senate and Assembly; a procedure for referring these proposals to the Attorney-General; a resubmission of the amendment for passage by the majority of the members of each of the two Houses; and then a reference to the next regular legislative session; publication for three months; another majority approval of all of the members of each House; and then submission to the people of New York for their majority approval and ratification of such amendments.

which Union elections must be based." (supra, p. 13). If there is anything that is clear from a reading of "LMR DA's" legislative history, and particularly the parts we quoted (supra, p. 16, 17), Congress rejected any such idea that there were certain specific rules and regulations for union elections that somehow or other custom and usage had developed in the United States. Congress sought to promote its overall purposes of insuring democracy in unions by guaranteeing the right to nominate; the right to vote; the right to hold office; the right to fair campaigning; the right to an honest ballot count; and finally the right to regular frequent elections. Congress expressly refused to legislate the contents of Union Constitutions and By-Laws.

The Courts have not misunderstood this as the Secretary apparently has, and have specifically approved this concept. See *Wirtz* v. *Hotel, Motel and Club Employees, Local 6*, (supra) and *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, (supra).

The Secretary's Real Objection to the "Double Duty" Provision Is *Not That It Is "Undemocratic"*.

If the Secretary's remarks during the July 1st hearing and the statements in his brief to the Court of Appeals, are read carefully, it is clear that his real objection to the "double duty provision" is not that it is undemocratic. His real objection is to the form of the IOMM&P structure.

Although he refers to the "double duty provision" as "totally undemocratic" (J.A. 85), the real problem is that the IOMM&P divisional structure does not fit within the typical Union Local structure nor the typical Union National structure. The old Local structure of the IOMM&P is familiar to the Secretary. The centralized

national structure of the National Maritime Union is familiar to the Secretary. However, the current intermediate IOMM&P structure is not.

The Secretary also objects to the National officers performing certain "extremely important functions" within the Offshore Division. He so stated to the Court below:

> "Let me just emphasize that these officers perform extremely important functions. They negotiate the contracts for the Offshore Division as well as dispense the funds and do all of the major functions . . . of Union officers." (J.A. 102)

However, more accurately stated, he doesn't object to their performing these functions per se. His real objection is to their performing these functions under the IOMM&P divisional structure. See for example, the following statements by the Secretary, to the Court below and in his brief to the Court of Appeals:

> "What Mr. Epstein has avoided saying is that they tried to concentrate power in the International officers. *There is nothing wrong with concentrating power* if it is done properly. In fact they have done it improperly." (J.A. 108-109) (Emphasis ours)

> "If the IOMM&P wants to concentrate power in its International officers, *they can do so by modifying its charter in some appropriate way.* However, the scheme now used to effect that purpose does not square with the requirements of Section 481." (J.A. 274) (Emphasis ours)

So, what the Secretary is saying is that if the IOMM&P Constitution (charter) provided for the same type of organization as the National Maritime Union, it would be permissible for the National officers to exercise executive and fiscal functions over the "Offshore"

members of the IOMM&P even though the majority of those Offshore members hadn't voted for them. In other words, if the IOMM&P adopted a straight line N.M.U.[28] type national organizational structure, with all of the members of the Union voting for all of the officers in the Union, then it would be permissible for the National officers to act as Executive and Fiscal officers for the Offshore members, even though their plurality was accomplished by their popularity among the Pilot members and Inland members.

The Secretary has chosen an odd way to encourage democracy in unions. What he is saying is that the IOMM&P either has to go back to its old arrangement of Locals or make, in one step, the whole journey of change to a straight line national structure. The intermediate step, i.e., divisional structure, is impermissible as far as the Secretary is concerned, ". . . without there being a separate election among the members of the Offshore Division alone for their own three principal officers. . . ." (See Interlocutory Order, *supra*, p. 4 footnote 6).

One of the many problems caused by Judge Motley's order which requires that three new offices be created, is whether or not these new officers get paid. The Secretary, not wanting to be accused of causing very substantial additional expense, takes a hands-off position. At J.A. 116 he says:

> "Just so it is clear the question of whether they are paid or not paid is a Union question. We don't insist that they do or don't be paid. But the Union can make its own provisions as to being paid."

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[28] The N.M.U. is, of course, composed of Offshore members, Inland members, Canal Zone members, Shore members, etc. and all members vote for all officers. See *Wirtz* v. *National Maritime Union*, 70 LRRM 2010 (S.D.N.Y. 1968).

To create jobs of this calibre, and then not provide for any pay could obviously create a mess. Who would be willing to run for such jobs; how could these unpaid jobs be combined with other paying jobs, either in the Offshore Division, or in the other Divisions and Locals of the IOMM&P. The three National officials, for example, do not have to be Offshore Division members to run for the three National offices. However, if they are Offshore Division members, as all of them now are, they could run for these unpaid jobs and do "double duty". But, if one or more of them were members of some other Division, or subordinate body of the IOMM&P, then they could only run for the National job and not run simultaneously for one of the three unpaid top Offshore Division jobs.

Unfortunately, providing that the job will be paid may clarify the solution but it hardly provides a satisfactory one. The provision which provides for the National officers to do "double duty" as Executive Officer, Assistant Executive Officer and Fiscal Officer of the Offshore Division is part of the overall restructuring of the IOMM&P. Because of these duties, the three National officials were made full time officials and their salary was determined accordingly. For many years, only the National Secretary-Treasurer was full time; then the International President became full time; but it was only with the restructuring of the Union in 1970 that all three officers became full time. What functions will three full time paid officials of the International now perform if three new paid offices are created for the Offshore Division and the officers who fill them perform the executive, assistant executive and fiscal duties for that division?

POINT III

The Court below erred in holding the "double duty provision" illegal under § 481(a).

The Secretary does not argue that the "double duty provision" violates either the express or clear language of § 481(a), (b) and (d). The Secretary also concedes that he cannot specify which of the three subsections—(a), (b) or (d)—the "double duty provision" violates. (J.A. 274-275).

The Secretary argues, however, that "a fair reading" of the statute requires the finding of a violation; and that it was not necessary for him to specify which of the subsections (a), (b) or (d) was violated.

The Court below found that § 481(a) was violated and accepted the Secretary's arguments that *Wirtz* v. *National Maritime Union* [29] was controlling; and that the "double duty provision" violated certain "democratic principles".[30]

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[29] The Secretary was willing to argue that *Wirtz* v. *National Maritime Union of America*, 399 F.2d at 551-3 "is on point". He then elaborated saying:

> "There, a port agent and certain patrolmen of the defendant union were found to be 'officers' for which positions an election had not been held in violation of section 481(a). The situation is similar in the instant case." (J.A. 274, footnote).*

[30] Although it is contrary to the legislative history of "LMRDA" (*supra*, p.15-17), and contrary to *Wirtz* v. *Hotel, Motel and Club Employees, Local 6*, and *Wirtz* v. *Local 153, Glass Bottler Blowers Association*, the Secretary urges his conception of "democratic principles" in the following manner:

> "Democratic principles require that those who are to be represented should alone have a right to select their representatives. Their votes should not be diluted by outsiders whose interests may not always coincide."

As we have previously stated, the issue in the National Maritime Union case and the issue in the instant case is completely different. (*supra*, pp. 11-13). Also, the Secretary's explanation of "democratic principles" does not square with either the legislative history of § 481(a) nor with the subsequent United States Supreme Court decisions. (*supra*, pp. 15-17).

The IOMM&P meets the democratic safeguards contemplated by the Act and specifically by § 481. For example, the Union elects its National officers every *three* years, although § 481(a) would permit them to hold office for five years. These officers are elected by a referendum of all the members in good standing, instead of by delegates to a convention as the statute pe[illegible]. The Union's referendum is a ninety day secret ma[illegible]allot vote. The Union's Constitution expressly mandates that the secret mail ballot referendum be conducted and the results certified by an impartial balloting agency; and the American Arbitration Association has for many years conducted all the elections. An elaborate procedure for election challenges and appeals is set forth in the Union's Constitution. Whatever else may be said, no one has argued that the IOMM&P's Constitution and By-Laws do not provide fair, frequent secret ballot elections with an honest ballot count, and the right of its members to nominate, vote and hold office.[31]

The IOMM&P maintains that the "LMRDA" does not impose an absolute prohibition against any person who is not a member of a particular subordinate organization (but who is a member of the parent organization) participating in the selection of persons to fill prescribed

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[31] In the main case, the Court of Appeals said, that the only vice in this case ". . . was a single incident involving the distribution of unlawful literature" (J.A. 306).

positions in the subordinate organization. See, for example, *Fritsch* v. *Painters, District Council 9*, 493 F.2d 1061 (2d Cir. 1974); cf, *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171 (1964). Specifically, we do not read the Act as imposing an absolute prohibition upon duly elected officers of a parent union serving, by virtue of their offices, as officers of a subordinate body.

The provisions of the IOMM&P Constitution do not deprive any Offshore Division member of the right to vote for all Offshore Division officers, nor do the votes of any members count more than the votes of other members. In *Gordon* v. *Laborers*, 351 F. Supp. 824 (W.D. Okla. 1972), the Court stated:

> "Thus, not only is there nothing to indicate that Congress intended to impose a system of voting or representation on unions which would undermine their long-established traditions of representative trade union government. In fact, the court concludes that it was the intent of Congress to leave intact such well-established union practices and procedures."

As we read the law, and as the *Fritsch* opinion and cases cited therein indicate, the test of legality is the reasonableness of the provision in all the circumstances and the factual justification for the structure embodied in the Union Constitution. The IOMM&P maintains that its divisional structure, and the "double duty provision" which is a part thereof, is "reasonable" and lawful.

CONCLUSION

For all the reasons stated above, that portion of the Judgment and Order below which declares the "double duty provision" invalid should be vacated.

Dated: October 29, 1976
New York, N. Y.

Respectfully submitted,

MARVIN SCHWARTZ
Attorney for Defendant-Appellant
243 Waverly Place
New York, New York 10014
Tel. 212—691-2250

MARVIN SCHWARTZ
BURTON M. EPSTEIN
Of Counsel.

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Robert B. Fiske

UNITED STATES ATTORNEY

Nov. 3, 1976

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